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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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GTE Telephone Operating Companies

)

GTOC Tariff FCC No. 1

)

CC Docket No. 98-79

GTOC Trans. No. 1148

)

**REPLY COMMENTS OF RCN TELECOM SERVICES, INC.  
ON PETITIONS FOR RECONSIDERATION**

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, pursuant to the Public Notice of December 4, 1998,<sup>1</sup> submits these reply comments on the Petitions for Reconsideration filed by MCI WorldCom, Inc. ("MCI WorldCom Petition") and the National Association of Regulatory Utility Commissioners ("NARUC Petition") regarding the Commission's Order permitting the tariff for an ADSL local exchange service offered by GTE Telephone Operating Companies ("GTE") to be filed at the federal level as an interstate access tariff.<sup>2</sup> The comments filed by those parties opposing the MCI WorldCom and NARUC Petitions demonstrate that there is common ground with parties, including RCN, that support the Petitions for Reconsideration. At the same time, the opposing parties continue to misapply Commission precedent on the jurisdictional analysis of traffic between end users and ISPs. In the end, the comments filed in regard to the MCI WorldCom and NARUC Petitions illustrate how far afield the Commission ventured in the *GTE*

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<sup>1</sup>Pleading Cycle Established for Petition of MCI/WorldCom and National Association of Regulatory Utility Commissioners (NARUC) for Reconsideration of GTE DSL Order, Public Notice, CC Docket 98-79, DA 98-2502 (rel. Dec. 4, 1998).

<sup>2</sup>*In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order (rel. Oct. 30, 1998) ("*GTE ADSL Order*").

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*ADSL Order* when a far simpler, and less problematic, approach exists, as the Separate Statement to the *GTE ADSL Order* explained. The Commission should reconsider the *GTE ADSL Order* more along the lines of the Separate Statement, while permitting states to regulate the rates and terms of GTE's ADSL service.

**I. RCN Agrees with the ILECs that "Communications" May Not End at the ISP, Although Telecommunications Do**

The good news that can be drawn from the comments is that RCN and the ILECs are in agreement about something. A number of ILECs assert that the basis for the Commission's jurisdiction over GTE's ADSL service is that it involves "interstate or foreign communication by wire."<sup>3</sup> BellSouth, in fact, makes the point succinctly: "the statutory framework of the Communications Act is not limited to telecommunications services and information services. To the contrary, the Commission has jurisdiction over all interstate communications and the Act defines communications very broadly."<sup>4</sup> RCN would agree with that statement, and could see how the Commission could assert jurisdiction over GTE's ADSL service (although the service would be tariffed at the state level), without ever having to address the question in this Order whether the telecommunications between the end user and the ISP -- one of the components in the "interstate

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<sup>3</sup>BellSouth Comments at 3; Bell Atlantic Comments at 1-2;

<sup>4</sup>BellSouth Comments at 3 (citations omitted).

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communication by wire" -- terminates at the ISP.<sup>5</sup> Although RCN contends that telecommunications does terminate there, that finding is not necessary to resolve the issue before the Commission.

## II. The *MemoryCall* Decision Adds Little to the Case

Many of the ILEC commenters rely on the *MemoryCall* decision for their position that the Commission has rejected the argument that Internet communications are severable into mutually exclusive telecommunications and information services.<sup>6</sup> Although the *MemoryCall* decision did

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<sup>5</sup>BellSouth concurs with the theory that telecommunications terminates at the ISP and that information services are provided beyond that point. In footnote 6 of its comments, BellSouth criticizes MCI WorldCom's assertion that "the Commission found that telecommunications continues through the ISP location to the distant website." To the contrary, BellSouth says "the Commission concluded that the communications at issue here does not terminate at the ISP's local server." BellSouth Comments at n.6. The inference to be drawn from BellSouth's accusation that MCI WorldCom transforms "communications" into "telecommunications" is that communications continue past the ISP but telecommunications do not.

<sup>6</sup>BellSouth Comments at 5-7; Ameritech Comments at 6-10; US WEST Comments at 6-8, citing *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992) ("MemoryCall Case"), *aff'd per curiam sub nom. Georgia PSC v. FCC*, 5 F.3d 1499 (11th Cir. 1993). The ILEC commenters also mischaracterize the argument that telecommunications and information services are mutually exclusive, and thus separate for regulatory purposes. GTE, for example, refers to the CLEC argument as the "long-discredited two-call approach." GTE Comments at 3. First, no CLEC, to RCN's knowledge, has ever espoused a "two-call" approach. There is, in fact, only one "call" in the Internet transmission, and that is the local link between the end user and the ISP. There are, however, two transmissions: one telecommunications service provided by local exchange carriers, and one information service provided by ISPs. Not only was this argument never "discredited," but it had never even been addressed before the *GTE ADSL Order*. Quite simply, if the Commission can hold that information services are "mutually exclusive" from telecommunications for the purposes of contributions to universal service, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998), it follows that the Commission must also hold that they are "mutually exclusive" for other regulatory purposes.

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involve state regulation of an enhanced service provided by BellSouth, the enhanced service nature of the offering was, at bottom, not relevant to the holding of that case, and it certainly did not address the situation presented here. The Georgia Commission in *MemoryCall* sought to bifurcate the telecommunications component between an end user and an enhanced service provider simply because it was being delivered to an enhanced service provider. Neither RCN nor any other CLEC has argued that the *telecommunications* component should be bifurcated between the end user and the enhanced service provider; that conclusion is clearly inconsistent with Commission precedent. The point of separation for regulatory purposes, and not for a determination of jurisdiction, is where the telecommunications ends and the information service begins: the point where the information service provider receives the incoming telecommunications.

In fact, *MemoryCall* is fully consistent with the theory that telecommunications terminates, for regulatory purposes, at the point it is delivered to an information service provider. The enhanced service provided by BellSouth -- access to a voice mail apparatus -- was provided entirely at the terminating end of the telecommunications. All of the interstate communications that provided the Commission with jurisdiction over the voice mail service and the right to preempt state regulation of it, occurred on the telecommunications end of the communications, before it ever reached the enhanced service. While *MemoryCall* has the attraction to ILECs of having an "enhanced services" component, that factor is not relevant to the question (already decided by this Commission) whether telecommunications are "mutually exclusive" from information services. Again, the Commission need not even address the issue in this proceeding because there is an acceptable alternative: the

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Commission may assert jurisdiction over GTE's ADSL service on the basis that it is used in "interstate or foreign communications by wire."

**III. As the Comments Demonstrate, the *GTE ADSL Order* Says Far More Than Is Needed**

The MCI WorldCom Petition and NARUC Petition raise serious concerns regarding the underlying wisdom of the *GTE ADSL Order*. These include whether there is support in the record for the Commission's finding that ten percent of the total traffic carried over the loops using GTE's ADSL service can be considered interstate, the policy implications of denying state commission authority over a service provided over the local loop by a local exchange carrier by an assertion of exclusive federal jurisdiction over ADSL service, and the effects of such an assertion of federal jurisdiction on the separations regime. Doubtless there are many more, including, as RCN raised in its initial comments, the inconsistency with the Telecommunications Act by a finding that GTE's service is an "access service," and the exploitation by RBOCs of the *GTE ADSL Order* in litigation over reciprocal compensation to CLECs, a result which the Commission explicitly sought to avoid.

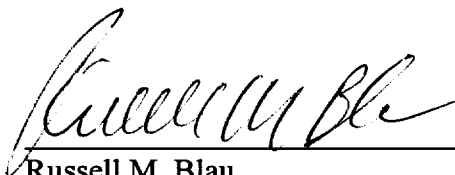
The Pandora's Box that has been opened by the *GTE ADSL Order* was anticipated by Commissioners Furchtgott-Roth and Tristani in their Separate Statement. These Commissioners urged caution and a far more limited scope to the *GTE ADSL Order*. The Commission should heed their advice. A far narrower approach is in order for GTE's ADSL tariff that does not exclude state commission regulation, does not provide grist for the mill in ILEC litigation to avoid contractual obligations, and does not raise more questions than it answers. The Commission should reconsider

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the *GTE ADSL Order* and come to the conclusion that the Commission has jurisdiction over ADSL service because it may be used in interstate or foreign communication by wire. Any other conclusions about the Commission's end-to-end analysis can be made, if they need to be made at all, in the subsequent Commission order on reciprocal compensation between local exchange carriers.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

I, Michael W. Fleming, hereby certify that the foregoing REPLY COMMENTS OF RCN TELECOM SERVICES, INC. ON PETITIONS FOR RECONSIDERATION was served on this 19<sup>th</sup> day of January, 1999 upon the following persons by first class mail, postage prepaid, except as indicated.

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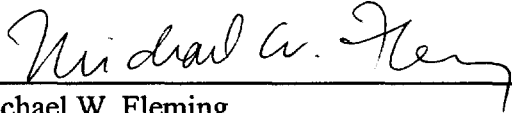


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